

No. 82-1755

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

Alfred Branch, Fred Jacobazzi, and Keith Bass,
petitioners,

-v-

Rollins Freeman,
respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Of Counsel:

Shelley A. Bannister
343 South Dearborn Street
Suite 1607
Chicago, Illinois 60604
312-663-1119

Gerald A. Block
1312 West Farwell
Chicago, Illinois 60626
312-262-8620

Barry A. Spevack
29 South LaSalle Street
Suite 720
Chicago, Illinois 60603
312-782-8500

Michael D. Monico
29 South LaSalle Street
Suite 720
Chicago, Illinois 60603
312-782-8500

Questions Presented

1. Without cause, state correctional officers repeatedly punched and kicked a prisoner in the back, face, and testicles, and then maliciously dragged him up several flights of iron stairs before tossing him into an empty prison cell. Was the jury's verdict of \$3000 in compensatory damages and \$1000 in punitive damages a proper award in light of the trial court's instructions that they should compensate the prisoner for the nature, extent and duration of injury, general pain and suffering, humiliation and mental distress, and violation of plaintiff's constitutional rights.
2. Whether prisoners are protected under the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Opinion Below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	7

TABLE OF CASES

Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980)	6
Butz v. Economu, 438 U.S. 478 (1978)	5
Carey v. Piphus, 435 U.S. 247 (1978)	3-4
Carlson v. Green, 446 U.S. 14 (1980)	5
Corriz v. Narranjo, 667 F.2d 892 (10th Cir. 1981)	4, 5
Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973)	6
Doe v. District of Columbia, 697 F.2d 1115, 701 F.2d 948 (D.C. Cir. 1983)	4, 5
Freeman v. Franzen, 695 F.2d 485 (7th Cir. 1982)	5
Georgia v. Evans, 633 F.2d 413 (5th Cir. 1980)	6
Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) ...	4
Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)	6
Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982)	4
Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983)	4
Martinez v. Rosario, 614 F.2d 829 (2d Cir. 1980)	6
Phillips v. District of Columbia, (D.C. Cir. No. 80- 2171, decided January 11, 1983)	4
Wiltsie v. California Department of Corrections, 406 F.2d 515 (9th Cir. 1968)	6

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

Alfred Branche, Fred Jacobazzi, and Keith Bass,
petitioners,

-v-

Rollins Freeman,
respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals is reported at 695 F.2d 485, and is reproduced in petitioners' brief at Appendix A, pp. 1-15.

Jurisdiction

The judgment of the Court of Appeals was entered on December 15, 1982. (Pet. App. B) A petition for rehearing was filed within 90 days. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

While petitioners' statement of this case generally suffices for purposes of disposing of this petition, respondent, at the risk of injecting argument into the statement of facts, must take exception to petitioners' depreciation of the evidence respondent produced at trial. Respondent complained at trial that petitioners maliciously and without cause beat him while he was a prisoner at Stateville Correctional Center in Joliet, Illinois. The petitioners frame their question presented and statement of the facts to suggest that the jury awarded respondent \$3000 in compensatory damages and \$1000 in punitive damages because respondent was "treated roughly" and sustained a "black eye," with petitioners employing that latter description to connote some kind of insignificant, relatively painless, injury. In fact, one correctional officer who witnessed the incident testified that he saw five to eight other correctional officers, including two of the petitioners, beat and kick the respondent, and he testified that he saw respondent struck at least ten times. The injury shrugged off by the petitioners as a mere "black eye" occurred when one petitioner, wearing a heavy metal ring, punched respondent two times in the face at a time when respondent's arms and legs were in the grasps of other correctional officers. In addition, the jury on several occasions viewed a videotape that showed two of the petitioners

dragging respondent up several flights of iron stairs, in a manner calculated to bang his body helplessly on the steps as they went. Certainly, as petitioners' statement of the events does reveal, the petitioners denied any wrongdoing, and they presented contradictory evidence. However, the jury, forced to resolve the conflicting testimony, resolved it in favor of the respondent.

ARGUMENT

1.

THE DECISION BELOW DID NOT REACH ANY ISSUES REGARDING THE PROPER SCOPE OF DAMAGES UNDER 42 U.S.C. 1983.

The evidence at trial showed that the petitioners repeatedly punched and kicked the respondent in the back, face, and testicles, and then dragged him ruthlessly up several flights of iron stairs before tossing him into an unoccupied prison cell. It also showed that respondent sustained physical injury, pain, suffering, hospital treatment, and mental distress. The jury awarded respondent \$3000 in compensatory damages. The petitioners, who fortunately did not permanently maim or kill the respondent, object to this award. They argue that the trial judge erred when he instructed the jury that it could consider, when assessing damages, not only the nature, extent, and duration of injury, general pain and suffering, humiliation, and mental distress, but also the violation of respondent's constitutional rights. The petitioners view this case as one that presents a question concerning the scope of Carey v. Piphus, 435 U.S. 247 (1978): whether a plaintiff may recover damages for the intrinsic value of the constitutional right violated.

In Carey this Court rejected the argument that monetary damages may be awarded for procedural constitutional violations in the absence of actual injury, solely because the rights are valuable "in and of themselves." Id. at 254. This case is far removed from the problems confronted in Carey, because this case involves substantive constitutional rights and the existence of actual, physical injuries. Contrary to petitioners' assertion, no split in the circuits exists on whether plaintiffs may receive damages for substantive constitutional violations when actual injuries do in fact exist. All cases since Carey have held that monetary damages may be awarded for the violation of such constitutional rights, depending on the nature of the right violated and so long as actual injury existed. See, e.g., Corriz v. Naranjo, 667 F.2d 892 (10th Cir., 1981), cert. dismissed pursuant to Rule 53, 103 S. Ct. 5 (1982); Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981); see also Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983). In Doe v. District of Columbia*; 697 F.2d 1115, 701 F.2d 948 (D.C. Cir. 1983), the case cited by petitioners to be in conflict with the others, there were no actual physical injuries to the plaintiffs. The Seventh Circuit agrees that compensable injury must exist for the court to award more than nominal damages. See, e.g., Kincaid v. Rusk, 670 F.2d 745, 746 (7th Cir. 1982).

In any event, the petitioners read the opinion of the Seventh Circuit in this case too broadly: it did not need to and it expressly did not decide whether a plaintiff could recover damages

* Petitioners cite Doe v. District of Columbia as Phillips v. District of Columbia, the name under which it appeared in slip opinion form on January 11, 1983. It was later amended before being released under the name of Doe.

for the inherent value of his constitutional rights violated in the absence of actual injury. The court stated:

Instructing the jury to assess damages according to the nature, extent, and duration of physical injury, general pain and suffering, humiliation, and mental distress, and the violation of plaintiff's constitutional rights, the district court merely distinguished between a common law action for battery and a violation of civil rights to insure that the plaintiff received full compensation for his injuries.

Freeman v. Franzen, 695 F.2d 485, 493 (7th Cir. 1982). The court expressly found that the evidence amply supported the amount of the verdict. Id. at 494. The Seventh Circuit never reached the issue the petitioners wish decided here because it found that the listing of the constitutional right as an element of damages merely listed the particular nature of the wrong,^{*} just as if the court had listed battery or aggravated battery in an appropriate case. (Which is an important distinction to make, particularly here, where the violation was committed under color of state law. See Carlson v. Green, 446 U.S. 14, 21, 24-25 (1980); Butz v. Economu, 438 U.S. 478, 505 (1978).) Accordingly, the Seventh Circuit specifically stated that "the instruction did not direct the jury to award compensation for the inherent value of the constitutional right itself." Id. at 492.

*Unlike the lengthy instructions in Corriz and Doe, for example, that told juries they could compensate the plaintiffs for the violations of the constitutional rights in and of themselves. Corriz instructed the jury that the value of the right, "while difficult to assess, must be considered great," Corriz, 667 F.2d at 897, and Doe directed the jury that it should arrive at a figure based upon considerations "of equity, reason, and pragmatism." Doe, 697 F.2d at 1122. In contrast, the court in Freeman simply listed seriatim the "violation of the constitutional right" as one of the five "elements of damage" to be considered by the jury. Freeman, 695 F.2d at 492.

As the instruction did not direct the jury to award compensation for the inherent value of the constitutional rights violated, the Seventh Circuit did not decide, in this case, whether compensation for the inherent value of the constitutional right violated could be awarded. Therefore, the issue petitioners seek to have reviewed does not exist in this case and the certiorari petition should be denied.

2.

NO SIGNIFICANT QUESTION CONCERNING THE SCOPE OF THE FOURTEENTH AMENDMENT IN PRISONER CIVIL RIGHTS LITIGATION IS PRESENTED IN THIS CASE.

The petitioners wish this Court to review the Seventh Circuit's holding that the Fourteenth Amendment due process clause applies to prisoners. They cite no authority to support their view that it does not, and every federal court of appeals that has passed on the question has, either expressly or by implication, held that prisoners are afforded Fourteenth Amendment protection. See, e.g., Martinez v. Rosario, 614 F.2d 829 (2d Cir. 1980); Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973); Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973); Georgia v. Evans, 633 F.2d 413 (5th Cir. 1980); Tolbert v. Bragan, 421 F.2d 1020 (5th Cir. 1971) (per curiam); Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980); Wiltsie v. California Department of Corrections, 406 F.2d 515 (9th Cir. 1968).

The petitioners construct their argument by noting that this Court has held that the Eighth Amendment protects prisoners

but not non-prisoners. From this, the petitioners conclude that the Eighth Amendment is the only amendment that protects prisoners. Nothing in any reported decision by this or any other Court supports such a suggestion.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,
ROLLINS FREEMAN

By: _____

Michael D. Monico
29 South LaSalle Street
Suite 720
Chicago, Illinois 60603
312-782-8500

Of Counsel:

Shelley A. Bannister
343 South Dearborn Street
Suite 1607
Chicago, Illinois
312-663-1119

Gerald A. Block
1312 West Farwell
Chicago, Illinois 60626
312-262-8620

Barry A. Spevack
29 South LaSalle Street
Suite 720
Chicago, Illinois 60603
312-782-8500

Office - Supreme Court
FILED
JUN 2 1983
ALEXANDER L STEVENS
CLERK

No. 82-1755
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

ALFRED BRANCHE, et. al.,

JUN 2 1983

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petitioners,

-vs-

ROLLINS FREEMAN,

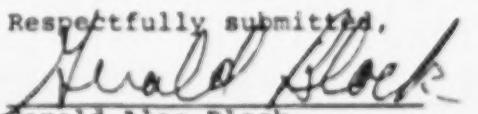
Respondent.

VERIFIED MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

I, Gerald Alan Block, upon being duly sworn, hereby states
as follows:

1. I was counsel for the respondent in the trial court and
in the Court of Appeals.
2. On May 22, 1981, the Respondent was granted leave to
proceed on appeal in forma pauperis. (See copy of motion and
order attached hereto.)

WHEREFORE respondent requests that this Court grant him
leave to proceed in forma pauperis in this Court.

Respectfully submitted,

Gerald Alan Block
One of Respondents attorneys

SUBSCRIBED and SWORN to
this 31st day of May, 1983


NOTARY PUBLIC

Expires Jun 19, 1984

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Aspen

Cause No. 79 C. 4205

Date May 22, 1931

Title of Cause Rollins Freeman vs. Gayle Franzen

Brief Statement of Motion Motion to Proceed on Appeal in Forma Pauperis

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

~~Names and Addresses of moving counsel~~

Gerald A. Block & Barry Spevack, Bannister, Block & Spevack
343 S. Dearborn, Suite 1717
Chicago, IL 60604
Jon Moore, Deutsch, Haas, Moore, Schmiedel, & Taylor
343 S. Dearborn, Suite 1607
Chicago, IL 60604

Representing

Rollins Freeman

~~Names and Addresses of other counsel entitled to notice and names of parties they represent.~~

Mr. Thomas Ippolito, Assistant Attorney General, Special Litigation Division
160 N. LaSalle St., Room 825, Chicago, IL 60601

Gayle Franzen

Reserve space below for notations by minute clerk

Plaintiff's motion for leave to appeal in forma pauperis is allowed.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

COCKETED
MAY 26 1931
Marvin E. Goff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED

MAY 12 1981

ROLLINS FREEMAN,)
Plaintiff,)
vs.) No. 79 C 4205
GAYLE FRANZEN,) JUDGE ASPEN
Defendant.)

M. STUART CUNNINGHAM
UNITED STATES DISTRICT COURT

MOTION TO PROCEED ON APPEAL
IN FORMA PAUPERIS

Now comes the Plaintiff, ROLLINS FREEMAN, by counsel and respectfully requests this court, pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure, to proceed on appeal in Forma Pauperis. In support of this motion, see the attached affidavit of ROLLINS FREEMAN.

Respectfully submitted,

ROLLINS FREEMAN,
BY:

Gerald Block

GERALD A. BLOCK
BARRY SPEVACK
BANNISTER, BLOCK & SPEVACK
343 South Dearborn
Suite 1717
Chicago, Illinois 60604
312/663-1119

JON MOORE
DEUTSCH, HAAS, MOORE, SCHMIEDEL, & TAYLOR
343 South Dearborn
Suite 1607
Chicago, Illinois 60604
312/663-5046

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON
APPEAL IN FORMA PAUPERIS

I, ROLLINS FREEMAN, being first duly sworn, depose and say that I am the Plaintiff, in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled redress; and that the issues which I desire to present on appeal are the following:

- i) whether the court erred in granting defendant Branche's motion for judgment notwithstanding the verdict as to punitive damages;
- ii) whether the court erred in granting defendant Jacobazzi's motion for judgment notwithstanding the verdict; and
- iii) whether the court erred in granting defendant Bass' motion for judgment notwithstanding the verdict.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____.

b. If the answer is no, state the date of your last

employment and the amount of the salary and wages per month which you received.

ACuretta Felt & Gasket Mfg Co. / 1-30-81 / 4.05 Rev/40h.

2. Have you received within the past twelve months any income from a business, profession or other form of self employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months?

3. Do you own any cash or checking or savings account?
Checking Acct

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? 1971 MAVERICK

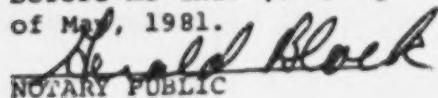
a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.
MARRIED WITH
ONE CHILD WHO IS DEPENDENT ON MYSELF AND MY WIFE WHO WORKS.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.


ROLLINS FREEMAN

SUBSCRIBED AND SWORN TO
before me this 9th day
of May, 1981.


Gerald Block
NOTARY PUBLIC